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STREAMCAST NETWORKS, INC., Plaintiff, vs. SKYPE TECHNOLOGIES, S.A., et al., Defendants.

CV 06-391 FMC (Ex)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2006 U.S. Dist. LEXIS 97392

September 14, 2006, Decided
September 14, 2006, Filed, Docketed and Entered

SUBSEQUENT HISTORY: Claim dismissed by, Motion granted by *Streamcast Networks, Inc. v. Skype Techs., S.A., 2006 U.S. Dist. LEXIS 97393 (C.D. Cal., Sept. 14, 2006)*

PRIOR HISTORY: *Streamcast Networks, Inc. v. Skype Techs., S.A., 2006 U.S. Dist. LEXIS 97391 (C.D. Cal., Sept. 14, 2006)*

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JUDGES: FLORENCE-MARIE COOPER, Judge.

OPINION BY: FLORENCE-MARIE COOPER

OPINION

ORDER GRANTING DEFENDANTS MARK DYNE, MURRAY MARKILES, KEVIN BERMEISTER, BRILLIANT DIGITAL ENTERTAINMENT, INC. AND ALTNET, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT UNDER *FED. R. CIV. P. 12(b)(6)*

This matter is before the Court on Defendants Mark Dyne, Murray Markiles, Kevin Bermeister, Brilliant Digital Entertainment, Inc. and Altnet, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint Under *Fed.*

R. Civ. P. 12(b)(6) (docket no, 42), filed on August 1, 2006. The Court has read and considered the moving, opposition and reply documents submitted in connection with the Motion, and deems the matter appropriate for decision without oral argument. *See Fed. R. Civ. P. 78*; *Local Rule 7-15*. Accordingly, the hearing set for September [*3] 18, 2006 is removed from the Court's calendar. For the reasons and in the manner set forth below, Defendants' Motion is GRANTED.

FACTUAL BACKGROUND

Plaintiff, StreamCast Networks, Inc. ("Streamcast") seeks relief for injuries arising out of Defendants' purported orchestration of "an elaborate over-seas shell game in an attempt to steal and wrongfully profit from technology that rightfully belongs to StreamCast." The relevant facts, as alleged in the First Amended Complaint ("FAC"), are as follows:

StreamCast is in the business of, among other things, developing, marketing, promoting and distributing a free peer-to-peer ("P2P") search and file sharing software application called Morpheus, which allows end users to search for, find, and download almost any type of digital file through one or more P2P networks over the Internet. FAC P28.

When StreamCast first entered the P2P file-sharing business in 2000, it utilized an open source software program called OpenNap. *Id.* P29. StreamCast became increasingly unhappy with the performance of OpenNap and, in the early part of 2001, began to shop around for a replacement software package. During its search, it came across a software application called [*4] FastTrack, the rights to which were wholly owned by Kazaa, B.V. ("Kazaa"), a Netherlands company. *Id.* PP 6, 29-30. FastTrack "was an innovative, decentralized P2P software application that allowed its users to exchange different types of digital files over the Internet" and, at the time (i.e., early 2001), "there was no other, comparable software application in existence...." *Id.* P29.

Recognizing what it believed to be an ideal business opportunity, StreamCast approached Kazaa's owners, Niklas Zennstrom and Janus Friis, regarding possible purchase, by StreamCast, of the rights to the FastTrack P2P software application. *Id.* P30. Zennstrom and Friis refused to sell their rights, but agreed to grant StreamCast a license for the FastTrack P2P software, in exchange for, among other things, a royalty. *Id.* P30.

On March 22, 2002, StreamCast and Kazaa entered into a License Agreement, whereby Kazaa licensed all of its rights in and to the FastTrack technology to StreamCast. The License Agreement also contained a provision providing a right of first refusal in favor of StreamCast to purchase any technology or other assets of Kazaa if any other party sought to acquire any of Kazaa's technology or [*5] other assets. *Id.* P31. [1]

1 The License Agreement is not attached to the FAC. StreamCast represents that this is because it contains a confidentiality clause which necessitates an entry of a protective order, an action that has not been accomplished to date.

Pursuant to the License Agreement, Kazaa delivered to StreamCast, in Los Angeles, California, working copies of the FastTrack P2P software. *Id.* P 32. StreamCast promptly began distributing FastTrack P2P software over the internet under the name Morpheus and its efforts were met with almost immediate success, with millions of downloads in a very short period of time. *Id.*

In June 2001, StreamCast officials met again with Zennestrom and Friis to try to negotiate the purchase, by StreamCast, of Kazaa and/or the right to the FastTrack P2P technology. *Id.* P 33. StreamCast hired Murray Markiles ("Markiles") to serve as its counsel in these negotiations, to whom StreamCast divulged confidential information about its relationship with Kazaa and its business plans with the Fast Track technology. Once again, StreamCast's purchase efforts were unsuccessful. *Id.*

In August 2001, StreamCast learned that Zennstrom, Friis, Kazaa and others may have [*6] secretly incorporated a "disabling" feature or other technology into the FastTrack P2P software provided to StreamCast, which would allow these individuals/entities to block Morpheus users from utilizing the Morpheus FastTrack network. *Id.* P34. StreamCast sought and obtained written assurances from Kazaa, Friis and Zennstrom, in the form of an amendment to the License Agreement, that no such "disabling" feature existed. *Id,* P 35.

Some time thereafter, StreamCast was approached by Kevin Bermeister and Mark Dyne, acting on behalf of Brilliant Digital Entertainment, Inc. ("BDE"). *Id.* P 39. Dyne and Bermeister represented that they wanted to "bundle" BDE's 3D digital media tool with StreamCast's Morpheus application; Dyne also proposed to invest in StreamCast, using funds from his company, EuroCapital Advisors. *Id.* StreamCast, represented by counsel Markiles, met with Dyne and Bermeister on several occasions, and disclosed to them "numerous, confidential items about StreamCast, the Fast Track P2P software, and its relationship with Zennstrom, Friis, and Kazaa, including that StreamCast held the right of first refusal in the underlying FastTrack technology." *Id.*

As a result of StreamCast's [*7] disclosures, Bermeister and Dyne became aware that Kazaa, Zennstrom and/or Friis actually owned the underlying FastTrack P2P technology and they [Bermeister and

Dyne] began formulating a scheme to purchase the same, through a third party. *Id.* Specifically, Markiles, Bermeister and Dyne, unbeknownst to StreamCast, approached Kazaa, Zennstrom and Friis and together they "concocted a plan to sell and otherwise transfer Kazaa's FastTrack P2P technology in violation of StreamCast's right of first refusal" and with the goal of destroying StreamCast as a competitor. *Id.* In furtherance of this plan, Bermeister and Dyne enlisted the help of a former business colleague, Nicole Hemming, to form Sharman Networks, Ltd., a corporation incorporated under the laws of Vanuatu. *Id.* P 40.

Although unaware of the burgeoning scheme between Markiles, Bermeister, Dyne, Zennstrom and Friis, StreamCast nonetheless became concerned about the integrity of the FastTrack P2P License Agreement due to Zennstrom, Friis and Kazaa's failure to produce certain "key documentation" relating to the operation and composition of the software, as specifically required by the Agreement. FAC P 41. StreamCast notified Zennstrom, [*8] Friis and Kazaa that it would withhold its monthly royalty payments commencing in December, 2001, until such time as the documentation was produced. *Id.*

On January 20, 2002, StreamCast received an email from Zennstrom, stating that Kazaa intended to sell and otherwise transfer ownership of Kazaa and its FastTrackP2P technology to Sharman Networks. *Id.* P 43. StreamCast immediately notified Zennstrom that it was invoking its right of first refusal under the License Agreement and offered to match Sharman's offer price. Zennstrom never responded. *Id.*

On February 25, 2002, StreamCast received a letter from Kazaa which purported to terminate the License Agreement and demanded that StreamCast return all versions of the FastTrack software to Kazaa. *Id.* P 44. Virtually simultaneously, and before StreamCast had the chance to respond, Zennstrom, Friis, Kazaa and other indivduals and entities (Hemming, BDE, Bluemoon OU, Altnet, Inc., and LEF Interactive PTY, Ltd.), activated a disabling feature in the FastTrack software--of the nature that they had previously represented did not exist--that allowed them to shut down StreamCast's Morpheus FastTrack network. Overnight, StreamCast's entire user base [*9] of over 28 million people was "funneled" to Sharman Networks, which now used the Kazaa/FastTrack P2P technology. *Id.*

At about this same time, Zennstrom and Friis also transferred the "source code" and "the core FastTrack P2P technology" to Blastoise, Ltd., a company organized under the laws of the British Virgin Islands or the Isle of Jersey. *Id.* PP 10, 45. Blastoise later became "Joltid" or "Joltid OU." *Id.* P 45.

At some date later in 2002, Zennstrom and Friis, with assistance from Markiles, Bermiester, Dyne and unknown others, formed a Luxembourg company called Skype Technologies ("Skype"). These same individuals then orchestrated a transfer of Joltid's P2P software to Skype. Today, Skype uses P2P technology to offer internet-based voice communications ("VOIP") services to consumers worldwide. *Id.* PP 46-47. It has over fifty-four million registered users, with over three million users on the network at any one time. *Id.* P 47.

On September 5, 2005, eBay, Inc. ("eBay") purchased Skype for a price in excess of $ 4.1 billion. *Id.* P 48. During the purchase negotiations, eBay became concerned about Zennstrom and Friis' "illicit and questionable past dealings." *Id.* P 49. It therefore required [*10] Zennstrom and Friis to represent and warrant that they had no dealings with Kazaa and Sharman Networks, which Zennstrom and Friis did. *Id.*

PROCEDURAL HISTORY

This action commenced on January 20, 2006, with the filing of Plaintiff StreamCast's Original Complaint for Damages for (1) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (2) breach of contract; (3) civil conspiracy; (4) unfair competition (*Cal. Bus. & Prof. Code § 17200 et seq.*); (5) fraudulent transfer under *Cal. Civ. Code § 3439.01 et seq.*; (6) unjust enrichment; (7) constructive trust; (8) declaratory judgment; (9) interference with contract; (10) interference with prospective economic advantage; and (11) conversion. The following individuals and entities were named as Defendants: (1) Skype Technologies, S.A.; (2) Niklas Zennstrom; (3) Janus Friis; (4) Kazaa, B.V.; (5) Joltid, Ltd., (6) Joltid OU; (7) Blastoise, Ltd.; (8) Bluemoon OU; (9) LA Galiote, B.V.; (10) Indigo Investment, B.V.; (11) Brilliant Digital Entertainment, Inc.; (12) Sharman Networks, Ltd.; (13) Kevin Bermiester; and (14) John Does 1-10 inclusive.

Streamcast filed the FAC on May 22, 2006, adding additional Defendants Mark Dyne; [*11] Altnet, Inc.; Fasttrack, B.V.; Consumer Empowerment, B.V.; Murray Markiles; LEF Interactive PTY, Ltd.; Eurocapital Advisors, LLC; and Nicole Hemming. The FAC also added new causes of action for (1) violation of the RICO; (2) conspiracy to restrain trade in violation of *§ 1* of the Sherman Act and *§§ 4* and *16* of the Clayton Act; and (3) conspiracy to monopolize, attempt to monopolize and monopolization in violation of *§2* of the Sherman Act and *§§ 4* and *16* of the Clayton Act.

By means of the instant motion, Defendants Dyne, Markiles Bermeister, Brilliant Digital Entertainment, Inc. and Altnet, Inc. (the "Moving Defendants") seek to dismiss the First through Fourth causes of action in the FAC

(i.e., the RICO and antitrust claims), on the grounds that the allegations contained therein fail to state a claim upon which relief can be granted. [2]

> 2 For the reasons set forth in the Court's Order Granting Defendants Mark Dyne, Murray Markiles, and Altnet, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint on Statute of Limitations Grounds, filed concurrently with this order, *all* of the causes of action set forth in the FAC against Defendants Dyne, Markiles and Altnet, Inc. are barred by [*12] the applicable statutes of limitations. Accordingly, the instant motion is moot as to said Defendants.

STANDARD OF LAW

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to seek dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. The Court will not dismiss claims for relief unless the plaintiff cannot prove any set of facts in support of the claims that would entitle him to relief. *Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002)*; *see also Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998)*. All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1229 (9th Cir. 2004)*("The general rule for 12(b)(6) motions is that allegations of material fact made in the complaint should be taken as true and construed in the light most favorable to the plaintiff.")(citing *Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)*). However, the Court "is not required to accept legal conclusions cast in the form of factual allegations [*13] if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994)*(internal citations omitted).

If the Court dismisses the complaint, it must decide whether to grant leave to amend. Denial of leave to amend is "improper unless it is clear that the complaint could not be saved by any amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 403 F.3d 1050, 1055 (9th Cir. 2005)*. However, the district court's discretion to deny leave to amend is decidedly broader where the plaintiff has previously filed an amended complaint. *Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir. 2004)*.("Where the plaintiff has previously filed an amended complaint, as Miller has done here, the district court's discretion to deny leave to amend is 'particularly broad.'").

DISCUSSION

I. Whether the FAC States a Claim for Relief under the RICO

A. RICO and the Nature of StreamCast's Claims

RICO proscribes "certain conduct involving a 'pattern of racketeering activity.' One of RICO's enforcement mechanisms is a private right of action, available to 'any person injured in his business or property by reason of a violation' of the Act's [*14] substantive restrictions." *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S. Ct. 1991, 1994, 164 L. Ed. 2d 720 (June 5, 2006)*(internal citations omitted); *18 U.S.C. § 1964(c)* ("Any person injured in his business or property by reason of a violation of *section 1962* of this chapter [*18 USCS § 1962*] may sue therefor in any appropriate United States district court...."). "Racketeering activity" is "any act indictable under various provisions of *18 U.S.C. § 1961* and includes the predicate acts... of mail fraud and wire fraud under *18 U.S.C. §§ 1341* and *1343*." *Forsyth v. Humana, Inc., 114 F.3d 1467, 1481 (9th Cir. 1997), aff'd 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999)*(internal citation omitted); *18 U.S.C. § 1961(1)(B)*.

StreamCast's FAC sets forth two separate RICO causes of action, against all Defendants except eBay, based on their involvement in the alleged "shell-game" to "destroy StreamCast, steal its user base and to secrete the FastTrack P2P technology away from StreamCast for their own benefit." FAC P 56. The first cause of action is for violation of *18 U.S.C. § 1962(c)*, which makes it unlawful for "any person employed by or associated with any enterprise engaged in, or [*15] the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *18 U.S.C. § 1962(c)*; *see also Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004)*("'Liability under *§ 1962(c)* requires (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'")(quoting *Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987)*(citing *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*). The second cause of action is for violation of *18 U.S.C. § 1962(d)*, which makes it unlawful for any person "to conspire to violate" the provisions of *18 U.S.C. § 1962(c)*.

B. Sufficiency of the Allegations in the FAC

It is well-established that there can be no "pattern" of racketeering under RICO absent the perpetration of at least two predicate acts of "racketeering activity" within a 10-year period. *H.J. Inc. v. Northwestern Bell Tel Co.,*

492 U.S. 229, 232, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (citing *18 U.S.C. § 1961(5)*); *see also Turner v. Cook, 362 F.3d 1219, 1229 (9th Cir. 2004)*("In [*16] order to constitute a 'pattern,' there must be at least two predicate acts of racketeering activity within ten years of one another."). However, while allegations of two or more predicate acts are a necessary condition to the establishment of a "pattern," they are not sufficient; "it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc., 492 U.S. at 240* (emphasis in original).

This continuity requirement may be satisfied by proof of either "closed-ended" or "open-ended" continuity. *Id. at. 241*. Closed-ended continuity involves "a closed period of repeated conduct," while open-ended continuity involves "past conduct that by its nature projects into the future with a threat of repetition." *Id.; see also Howard v. America Online, Inc., 208 F.3d 741, 750 (9th Cir. 2000)*("To satisfy the continuity requirement, Plaintiffs must prove either a series of related predicates extending over a substantial period of time [i.e., closed-ended continuity], or past conduct that by its nature projects into the future with a threat of repetition [i.e., open-ended continuity]....")(internal quotations omitted)(alterations [*17] in original). "Continuity does not require a showing that the defendants engaged in more than one 'scheme' or 'criminal episode.'" *Medallion Television Enters. v. SelecTV of Cal., 833 F.2d 1360, 1363 (9th Cir. 1987)* (internal citations omitted); *see also Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1528 (9th Cir. 1995)*("RICO's continuity requirement does not require multiple criminal schemes in the commission of the predicate acts, but that continuity may be established with predicate acts that are part of a single scheme.")(citation omitted). "The circumstances of the case, however, must suggest that the predicate acts are indicative of a threat of continuing activity." *Medallion, 833 F.2d at 1363* (citations omitted).

In *Medallion*, the Court found that plaintiff, an entity which had entered into a joint venture with defendant to acquire and exploit the television broadcasting rights to a highly promoted boxing match, could not allege a "pattern of racketeering activity" based on defendant's misrepresentations, via the mail, about the number licensing agreements it had obtained with cable television stations around the United States. *833 F.2d at 1361*. The Court noted that circumstances indicative [*18] of a "threat of continuing activity" were entirely absent. *Id. at 1363*. Specifically, the Court explained:

> This case involved but a single alleged fraud with a single victim. All of SelecTV's assertions about the number of licensing agreements it had obtained were parts of its single effort to induce Medallion to form the joint venture in order to obtain the broadcast rights from the promoters. In essence, Medallion's allegations concern a single fraudulent inducement to enter a contract. Once the joint venture had acquired the broadcast rights, the fraud, if indeed it was a fraud, was complete. Medallion has not directed us to any evidence that SelecTV defrauded it in any other way as a part of this scheme or any other, nor is there anything in the nature of the transaction to suggest that SelecTV would have needed to commit any other fraudulent acts. Similarly, notwithstanding Medallion's unsupported assertions to the contrary. Medallion was the single victim of the alleged fraud.

Id. at 1363-64.

The Ninth Circuit and other district courts therein have continued to follow of the reasoning of *Medallion* even after the Supreme Court's issuance of its decision in *H.J. Inc., supra.* For example, [*19] in *Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1535 (9th Cir. 1992)*, the Court determined that the plaintiff, a former employee of defendant, failed to allege a "pattern of racketeering" under RICO where defendant's conduct was limited to retaliatory measures taken in response to plaintiff's "whistleblowing" activities, culminating in plaintiff's discharge. Once again, the Court explained:

> [A]lthough Sever alleges a number of "acts," APC's collective conduct is in a sense a single episode having the singular purpose of impoverishing Sever, rather than a series of separate, related acts. In this respect, the conduct complained of is analogous to the conduct in cases like *Medallion Television Enterprises, Inc. v. SelecTV of California, Inc., 833 F.2d 1360 (9th Cir. 1987) cert. denied, 492 U.S. 917, 106 L. Ed. 2d 588, 109 S. Ct. 3241 (1989)*, and unlike the conduct in cases such as *Ticor Title Ins. Co. v. Florida, 937 F.2d 447 (9th Cir. 1991)*. In *Medallion*, the plaintiff alleged that the defendant fraudulently induced it into entering a television contract. Although we agreed that the plaintiff had alleged two predicate acts, we affirmed the grant of summary judgment for the defendant, noting [*20] that "Medallion's allega-

> tions concern a single fraudulent inducement to enter a contract. Once the [contract was entered into], the fraud, if indeed it was a fraud, was complete." *Medallion, 833 F.2d at 1364*. We were also influenced by the fact that, as in this case, there was but a single victim involved.

Id. at 1535; *see also Durning v. Citibank, Int'l, 990 F.2d 1133, 1139 (9th Cir. 1993)* (affirming district court's dismissal of RICO claim for failure to allege the existence of a "pattern of racketeering activity" notwithstanding the fact that defendants "may have committed numerous related predicate acts"); *Religious Technology Center v. Wollersheim, 971 F.2d 364, 366 (9th Cir. 1992)* ("Since the only goal of the Greene defendants was the successful prosecution of the Wollersheim state tort suit, there was no threat of activity continuing beyond the conclusion of that suit."); *Ricotta v. California, 4 F. Supp. 2d 961, 978 (S.D. Cal. 1998), aff'd without opinion by 173 F.3d 861 (9th Cir. 1999)* ("Similar to *Sever,* in this case Plaintiff alleges that the Defendants engaged in various activities, all with the single purpose of depriving him of a fair dissolution proceeding which caused [*21] an unfavorable result."); *Pierce v. Citibank (S.D.), N.A., 856 F. Supp. 1451, 1455 (D. Or. 1994)*.

Despite StreamCast's protestations to the contrary, the facts of this case, set forth in its detailed pleading, are highly analogous to those in *Medallion*, *Sever,* and others cited above. At its core, the FAC simply alleges that Moving Defendants and others engaged in certain activities (some of which involved the mails or wires) to perfect a single scheme with the singular goal of effectuating the secretion of the FastTrack P2P technology "away from StreamCast for their own benefit." FAC P56; *see also* FAC P57 (alleging that Defendants' "express plan" was "to secretly install one or more hidden disabling features in the Morpheus P2P software, to . . . redirect all of Morpheus' users to Sharman Networks' network, to set up one or more off-shore companies into which to transfer the FastTrack P2P technology, [and] . . . to secrete monies derived from their illicit activities."). Once the FastTrack technology was in fact in the hands of Sharman Networks and its principals, the scheme was, by its nature, complete. Accordingly, Defendants' alleged "shell-game" cannot be characterized as anything [*22] other than "a single episode with a single purpose which happened to involve more than one act taken to achieve that purpose." *Sever, 978 F.2d at 1535*. [3] The fact that Defendants continue to reap the benefits of their alleged illegal activity and/or that StreamCast continues to suffer the effects thereof, is of no import to the Court's "continuity" determination. *See, e.g., Pier Connection v. Lakhani, 907 F. Supp. 72, 76 (S.D.N.Y. 1995)* (recognizing that defendants' "continuing to reap such benefits [of a fraudulent scheme] is not itself a predicate act; it is only an effect of the alleged acts . . . .").

> 3 In addition, StreamCast essentially concedes that all of the alleged "predicate acts" by Moving Defendants leading up to the transfer of the FastTrack technology to Sharman Networks took place over the course of a relatively short period--i.e., mid 2001 through February 2002. *See* Opp'n at 18; *cf. GICC Capital Corp. v. Technology Fin. Group, 67 F.3d 463, 467 (2d Cir. 1995)* ("Since *H.J. Inc.,* other courts of appeals . . . have attempted to measure whether closed-ended continuity exists by weighing a variety of non-dispositive factors, including, *inter alia,* the length of time over [*23] which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes.").

Because it has failed to plead facts sufficient to establish the existence of "continuing racketeering activity" or a threat thereof, StreamCast has failed to allege that Defendants participated in a "pattern of racketeering activity." Consequently, it has failed to state a claim for relief under the RICO, *18 U.S.C. § 1962(c)*. [4]

> 4 Moving Defendants also fault StreamCast for (1) failing to allege any predicate acts of mail or wire fraud with the requisite particularity under *Fed. R. Civ. P. 9(b),* and *(2)* failing to allege the existence of a RICO "enterprise." However, because it is unequivocal that the allegations in the FAC are insufficient to fulfill the continuity requirement, these additional arguments need not be addressed.

C. Possibility of Amendment

It is clear to the Court that StreamCast's pleading deficiencies cannot be overcome by a grant of leave to amend. Because it was the alleged holder of the right of first refusal to purchase the FastTrack technology, it is axiomatic that StreamCast was the only victim of [*24] Defendants' alleged expropriation scheme. For the reasons set forth above, there exists no set of facts under which StreamCast can establish that the various acts undertaken by Defendants to deprive it of that right constituted a "pattern of racketeering activity." *Compare, e.g., Ricotta, 4 F.Supp. 2d at 978*; *see also Richardson v. Reliance Nat'l Indem. Co., 2000 U.S. Dist. LEXIS 2838 *26 (N.D. Cal. 2000)* ("Plaintiff has failed to cite a single case in which a closed-ended scheme with a single goal and a single victim was found to violate RICO."). Ac-

cordingly, StreamCast's RICO claims are properly dismissed *with prejudice.* [5]

> 5 Because StreamCast has failed to plead sufficient facts to state a claim under *18 U.S.C. § 1962(c)*, its conspiracy claim under *§ 1962(d)* necessarily fails as well. *See, e.g., Wagh v. Metris Direct, Inc., 363 F.3d 821, 831 (9th Cir. 2003).*

II. Whether SteamCast States Claims for Relief Under the Sherman and Clayton Acts

Moving Defendants argue that StreamCast's antitrust claims are defective for two independent reasons: (1) StreamCast fails to adequately allege/identify a legally cognizable "relevant product market"; and (2) StreamCast lacks "antitrust standing" [*25] because it fails to plead any "antitrust injury." Mot. at 20. The Court finds the first of these arguments to be persuasive and dispositive.

A. StreamCast's Burden to Allege a "Relevant Market"

As set forth above, StreamCast brings claims for Defendants' alleged violations of *Sections 1* and *2* of the Sherman Act. [6] *Section 1* prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 1*. "In order to establish a claim under *Section 1*, a plaintiff must demonstrate (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).*

> 6 While the Sherman Act provides the substantive basis for StreamCast's claims, the Clayton Act supplies a private right of action therefor. *See Glen Holly Entm't, Inc. v. Tektronix Inc. 343 F.3d 1000, 1007 (9th Cir. 2003)* ("This law [*section 4* of the Clayton Act] effectively allows private [*26] persons to sue for antitrust violations previously restricted by statute to government enforcement.").

As the Supreme Court recently explained, "*[p]er se* liability is reserved only for those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 1279, 164 L. Ed. 2d 1 (Feb. 28, 2006)* (quoting *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*). Accordingly, the Court "presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and unlawful." *Id.* (citations omitted). Under a rule of reason analysis, the plaintiff "bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'" *Tanaka, 252 F.3d at 1064* (quoting *Hairston v. Pacific 10 Conf., 101 F.3d 1315, 1319 (9th Cir. 1996)*).

Market analysis is also essential to StreamCast's monopolization claim under *Section 2*, which requires proof of (1) Defendants' possession of monopoly power [*27] in the relevant market and (2) Defendants' willful acquisition or maintenence of such power. *See Thurman Indus., Inc., 875 F.2d 1369, 1373 (9th Cir. 1988)* ("[D]efining the relevant market is indispensable to a monopolization claim."); *see also Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)* ("Market definition is crucial. Without a definition of the relevant market, it is impossible to determine market share."). Accordingly, "failure to identify a relevant market" is a proper ground for dismissal of both of StreamCast's Sherman Act claims. *See, e.g., Tanaka, 252 F.3d at 1063* ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.") (citing *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999)*); *see also N. Am. Energy Sys., LLC v. New Eng. Energy Mgmt., 269 F. Supp. 2d 12, 16 (D. Conn. 2002)* ("A plaintiff claiming a violation of *§§ 1* and *2* of the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monpolized."); Earl W. Kintner, 2-10 Federal Antitrust Law §10.16 (Matthew Bender 2005) ("In rule of reason cases, and any *Section 2* case requiring [*28] proof of market power, the plaintiff bears the burden of pleading a relevant market.").

B. Defining the Relevant Market

As alluded to above, the "relevant market" includes "'notions of geography as well as product use, quality and description,'" *Tanaka, 252 F.3d at 1063* (quoting *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)* (quoting *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977)*)). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Olin Corp, v. FTC, 986 F.2d 1295, 1298 (9th Cir. 1993)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*) (footnote omitted); *Oltz, 861 F.2d at 1446* ("The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand."). "Elasticity of demand is a concept used to signify the relationship between changes

in price and responsive changes in demand." *United States v. LSL Biotechnologies, 379 F.3d 672, 697 (9th Cir. 2004)*; *see also Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 469, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* [*29] (cross-elasticity of demand refers to "the extent to which consumers will change their consumption of one product in response to a price change in another.").

C. Whether the FAC Alleges a Cognizable Relevant Market

In the FAC, StreamCast alleges that the "relevant market" in which Defendants' behavior has had anti-competitive/monopolistic effects is "the worldwide market for the provision of FastTrack P2P file-sharing services and the selling of advertising directed to users of such services." FAC PP 68, 85. Moving Defendants do not take issue with the geographical component of SteamCast's market definition, but rather maintain that it is overly narrow with respect to its identification of the relevant product pool. Specifically, Moving Defendants assert that StreamCast's pleading is inadequate because it "provides no plausible explanation why the purported relevant market should be limited to FastTrack P2P software and services, when the worldwide market for P2P software and services is diverse and highly competitive." Mot. at 22. The Court agrees.

In its Opposition, StreamCast concedes that "traditional [cross-elasticity of demand] analysis is inapplicable in the present case because [*30] end users do not pay anything to use the FastTrack P2P technology." Opp'n at 25. Accordingly, it appears to the Court that the relevant market should be determined by the "reasonable interchangeability of use" (or lack thereof) between StreamCast's (FastTrack) "Morpheus" application and other P2P file-sharing services. However, the FAC contains nothing more than conclusory allegations about the uniqueness of the FastTrack software vis a vis other applications; it does not plead facts which establish that P2P file-sharing services using other applications are not "reasonably interchangeable" with Morpheus (i.e., that they cannot perform the same essential search and file-transfer functions, etc.). FAC P 29; *accord Tanaka, 252 F.3d at 1063* ("Tanaka has failed to identify an appropriately defined product market. Her conclusory assertion that the 'UCLA women's soccer program' is 'unique' and hence 'not interchangeable with any other program in Los Angeles' is insufficient."); *Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 442 (3d Cir. 1997)* (affirming dismissal of Sherman Act claims where "the products within [the] proposed market [were] interchangeable with other products outside of [*31] the proposed market"). In fact, StreamCast affirmatively pleads that it had a "large user base" even when it utilized operating software other than FastTrack, thus suggesting that the relevant product market *does* encompass P2P file-sharing networks that employ other operating technology. FAC P29. The fact that, upon Defendants' alleged activation of the FastTrack "disabling feature," StreamCast's users were "funneled to Sharman Networks" does not compel a contrary conclusion, as StreamCast does not allege that it continued to operate its network using other technology. FAC P44 (alleging only that Defendants "shut down the network of Morpheus users.").

Indeed, by attempting to limit the relevant market to only those P2P file-sharing services operating on FastTrack technology, StreamCast appears to be considering its *own* inability to successfully convert its Morpheus network from FastTrack to another application, rather than whether *consumers* (i.e., end users and/or advertisers) may reasonably interchange between FastTrack-based and other, non-FastTrack, P2P file-sharing services. *See* FAC P 70 (StreamCast has been unsuccessful in rebuilding its user base "in large part because of the [*32] lack of access to the FastTrack P2P technology. . . ."); P 81 ("StreamCast, for some time, has attempted to develop its own P2P VoIP technology but as of today has been unsuccessful."). This is not the proper test. *See Queen City Pizza, Inc., 124 F.3d at 438* ("The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'") (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*). Accordingly, in the absence of any allegations concerning a lack of reasonable interchangeability by *consumers* between Morpheus and other, non-FastTrack-based P2P file sharing services, StreamCast has failed to properly allege a legally cognizable relevant market. For this reason alone, its claims are subject to dismissal by the Court at this time. [7] *Compare Queen City Pizza, Inc., 124 F.3d at 436* ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . . the relevant market is legally insufficient and a motion to dismiss may [*33] be granted."); *America Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 858-859 (D. Va. 1999)* ("Where the relevant market proposed by the plaintiff is not even *alleged* to encompass all interchangeable substitute products, the market is legally (rather than factually) insufficient, and a motion to dismiss is appropriate.") (internal quotations omitted).

7 StreamCast is correct in pointing out that it is possible for a relevant market to be defined by only a single product or submarket. *See, e.g., Kodak, 504 U.S. at 481-82* (relevant market lim-

> ited to repair pans and services for Kodak photo-copiers "[b]ecause service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts . . . ."). However, this possibility does not obviate the need for StreamCast to plead, in the first instance, a lack of reasonable interchangeability between FastTrack P2P providers and non-FastTrack providers.

D. Possibility of Amendment

Unlike the RICO claims, StreamCast's antitrust claims could benefit from an opportunity to amend. *See e.g., Big Bear Lodging Ass'n, 182 F.3d at 1105* (leave to amend to be granted to permit plaintiffs to allege "that Defendants' conduct resulted [*34] in anticompetitive effects within appropriately defined markets."). Accordingly, the dismissal is *without prejudice.*

CONCLUSION

Based on the forgoing, Defendants Mark Dyne, Murray Markiles, Kevin Bermeister, Brilliant Digital Entertainment, Inc. and Altnet, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint Under *Fed. R. Civ. P. 12(b)(6)* (docket no. 42) is GRANTED. Plaintiff StreamCast's First and Second Claims for relief under the RICO are dismissed *with prejudice* as to Defendants Bermeister and Brilliant Digital Entertainment, Inc. StreamCast's Third and Fourth (antitrust) claims for relief are dismissed *without prejudice* to StreamCast's filing of an amended complaint against said Defendants to allege, if it can, the existence of a relevant geographic and product market in which trade was unreasonably restrained or monopolized. The amended complaint shall be filed on or before October 16, 2006.

IT IS SO ORDERED.

September 14, 2006

/s/ Florence-Marie Cooper

FLORENCE-MARIE COOPER, Judge

UNITED STATES DISTRICT COURT

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